No. 12882

# United States
# COURT OF APPEALS
## for the Ninth Circuit

ROBERT O. NORMAN,

*Appellant-Plaintiff,*

v.

SPOKANE-PORTLAND & SEATTLE RAILWAY CO., a corporation,

*Appellee-Defendant.*

Appeal from the United States District Court for the District of Oregon

HON. JAMES ALGER FEE, *Judge.*

## APPELLANT'S BRIEF



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STEVENS-NESS LAW PUB. CO., PORTLAND 4-51

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## APPELLANT'S BRIEF

## JURISDICTION

This is an appeal from a judgment order by Hon. James Alger Fee, Judge, dated and entered March 9th, 1951, dismissing appellant's action for damages in the sum of $275,000.00 for injuries sustained by reason of

the negligence of the appellee. From this judgment order appellant filed notice of appeal on March 15th, 1951.

The jurisdiction of the District Court of the United States for the District of Oregon was invoked under the Federal Employers' Liability Act, 35 Stat. 65 and 53 Stat. 1404.

## STATEMENT OF CASE

This action was instituted by appellant against appellee under the Federal Employers' Liability Act, for injuries sustained by him on January 10, 1947, while engaged in the work of repairing Rockton Bridge, a trestle of appellee, which bridge had fallen into disrepair; and while so employed as a carpenter the scaffolding upon which appellant was standing gave way and caused him to fall to the ground, a distance of 60 feet below, resulting in very serious injuries to appellant. During this repair work the appellee retained control and the constant use of said bridge and tracks and the repair crew were subject to appellee's train orders,—the train order containing line up of trains dispatched over Rockton trestle for January 10th, 1947, is shown by Exhibit 4.

The appellee was chartered by the State of Washington, as a common carrier engaged in interstate commerce by railroad in the transportation of persons and property within and between the states of Oregon and Washington. A part of its railroad track was on a certain trestle near Rockton, Oregon, known as Rockton

Bridge, which was owned and used by appellee in its interstate business.

The charter issued by the State of Washington to the appellee and the Findings of Fact II, inter alia, obligated appellee to maintain and keep in repair its railway lines, roadbed, tracks and bridges (R. 11-12).

Gilpin Construction Company was a private industrial corporation created by the statutes of Oregon, and was for years engaged in a general contracting business. In 1944 this corporation and the appellee entered into a contract by which the Gilpin Construction Company agreed to do repair and maintenance work on appellee's trestles and bridges including Rockton Bridge. Following is a copy of the contract between appellee and the Independent Contractor under which the work was done. Received in evidence and marked Defendant's Exhibit No. 7:

"DOCUMENT NO. SP&S 7208

THE GILPIN CONSTRUCTION COMPANY
GENERAL CONTRACTORS

4850 N. W. Front Avenue
Box 3860
Portland, Oregon

October 7, 1944.

Spokane, Portland and Seattle Railway Co.,
901 NW Hoyt Street,
Portland 9, Oregon

Attention: Mr. A. J. Witchell, Chief Engineer

Gentlemen:

As per our conversation of October 6th, we submit a proposal for furnishing labor and necessary

equipment to do repair and maintenance work on your trestles and bridges, as outlined in our talk, on a basis of cost plus ten (10%) percent.

Our costs are to include all expenses to us made up as follows:

All payrolls in connection with this work, all insurance on men, getting equipment and tools to and from the jobs and rentals on any equipment which is rented from others by us. On any equipment which is owned by us, the ten percent will not be added and all our rental prices are to comply with the OPA rental rates.

All saws, peavies and other miscellaneous small tools will be billed out to you at the start of the work and a credit will be issued at the finish of the job on the value of the tools according to their condition when returned.

We propose to have one timekeeper to take care of all the crews and his time will be distributed to the different jobs.

Our crews will be controlled by a foreman who will be directly in charge of the work. This foreman will receive $2.00 more per day than the pilemen, whose scale is $1.49 per hour.

On work where our boys have to live away from home, we will have to work them ten hours per day in order to get them to leave home and this extra time helps pay their board. It is also understood that our men will work on Saturdays at time and one-half pay.

Yours truly,
THE GILPIN CONSTRUCTION COMPANY
/s/ Otto Herman
Otto Herman, Vice President.

SPOKANE, PORTLAND AND SEATTLE RAILWAY CO.
ACCEPTED: By /s/ A. J. Witchell
Chief Engineer
APPROVED: By /s/ T. F. Dixon
Vice Pres & General Manager"

Appellant was a member of the crew of Gilpin Construction Company and on its payroll, but brought this action, not against the Gilpin Construction Company, but the Spokane-Portland & Seattle Railway Co., upon the theory that the railroad was under a non-delegable duty to perform such work by its own employees and was therefore liable to any workman performing that same service and injured while so engaged.

During the proceedings the parties concluded that the right to maintain such an action was practically reduced to the following question of law:

> "Where a railroad corporation engaged in interstate commerce contracts with an independent contractor for the construction, repair and maintenance of the railroad company's bridges and trestles used in interstate commerce, is it relieved from liability in damages under the Federal Employers' Liability Act for injuries to employees of the independent contractor occurring during the course of such work and caused by the independent contractor's negligent failure to provide a safe place and suitable equipment to the employees for such work?" (R. 4).

In time the question submitted was decided in the affirmative, and the Court dismissed the action. Hence this appeal.

## AUTHORITIES

See Index

The authorities on the question involved in this appeal are listed in alphabetical order in the index and will not be duplicated at this point, but will be referred to in the argument in the order of its logical development.

## SPECIFICATIONS OF ERROR

(R. 21-22)

1. The Court erred in entering the Judgment Order which is not supported by the Findings.

2. The Court erred in holding that the duty imposed upon appellee to maintain its railway lines and its road bed, tracks and bridges in a reasonably safe condition for its use in interstate commerce was a delegable duty.

3. The Court erred in holding that appellant may not maintain this action against appellee under the provisions of the Federal Employers' Liability Act because he was not an employee of appellee within the meaning of said Act, but an employee of an independent contractor.

4. The Court erred in holding that appellee, even though engaged in transportation of persons and property in interstate commerce and subject to the provisions of the Federal Employers' Liability Act, may delegate to an independent contractor the work of repairing, renewing and maintaining its tracks and bridges used in its interstate business in the sense that the employees of an independent contractor who are injured in such work are not employees of the railroad within the scope and meaning of the Federal Employers' Liability Act.

5. The Court erred in entering its Judgment Order dismissing this action as said Judgment Order is not supported by the Federal Employers' Liability Act and the interpretations by the courts of said Act.

## ARGUMENT

This appeal presents one question of law: That question is whether a common carrier engaged in interstate commerce can delegate to another its duties to maintain and keep in repair its roadbed, tracks and trestles, and thereby escape all liability for injuries to workmen sustained by them while engaged in the repairs of a trestle of appellee, due to the negligence of the contractor in charge of the crew in that a reasonably safe place in which to work was not provided the men repairing the trestle.

There is no controversy as to the facts involved in the solution of this question.

If the answer to the question of law involved is in the affirmative, then appellant has no claim against appellee; if in the negative, then the case must go back to determine the damages.

All specifications of error may be considered together under the question as to whether the Court made error in holding that the duty imposed upon appellee by its franchise to keep in repair its roadbed, tracks, and trestles could be legally delegated to an independent contractor, and the appellee held blameless for any negligence in said repairs resulting in injury to appellant engaged in said work and the appellant denied recourse against appellee for damages.

Appellant has always assumed that it was elementary that a Railroad could not delegate away any

of its essential functions as a Railroad to an independent contractor, or any body, or at all, and thus escape the obligations of the Federal Employers' Liability Act.

Appellant contends that the maintenance of appellee's track and trestles was essential to the exercise of its franchise rights and in making these repairs it was the nondelegable duty of appellee to provide the men who make the repairs a reasonably safe place in which to work and reasonably safe tools with which to work. This is the duty which appellee undertook to delegate to Gilpin Construction Company and the work appellant was doing when he fell sixty feet to his severe and permanent injury. Work in fact that appellee was unable to devest itself of control and was so interwoven with the work of exercising its franchise rights that it was unable to delegate to another. Furthermore the power of control lodged in appellee by its charter could not in law be delegated, nor could appellee in law fail to exercise that power of control, or fail to perform that duty itself.

Appellee was at Rockton bridge by virtue of a franchise issued to it by the State of Washington. Everything stemmed from that document. Nothing could be done by anybody but by virtue of that document. The duty to build the bridge, to repair it, to maintain it and to use it was vouchsafed by that document and imposed upon and exacted of appellee and of appellee only. The independent contractor could not have obtained or used that document, nor could appellant. Nobody but appellee could use it; nobody but appellee could do the

things required therein. The independent contractor could not by its own boot-straps lift itself into the position of a grantee of a franchise with the right to perform the duty of maintaining and keeping in repair the said bridge. Nor could said independent contractor put on the boots of appellee, nor could appellee itself lift the independent contractor by the contractor's boot-straps to the position and the plane only occupied by appellee.

The state in granting the charter clothed appellee with certain sovereign powers. Powers that it would not grant to an independent contractor. Powers that appellee could not escape or throw off even by bankruptcy. Powers that could not be obtained except by a grant from the state. Powers that could not even be granted by the state itself to a private corporation like Gilpin Construction Company. Powers that appellee could not even lease to another common carrier clothed with similar powers with a charter from the same state. It would seem that simply to state the premise would furnish the answer to the proposition in case at bar.

Whoever uses the rights contained in the charter uses the charter; whoever performs the duties or does the work contained in the franchise is doing that required of the grantee of the charter, and whoever does a thing through another, that is required of him, does it himself.

The question presented here is novel, in so far as the Supreme Court of the United States is concerned,—a case exactly like case at bar has not been found. The Supreme Court has refused to grant certiorari in cases

in which the question of delegation occurred. Likewise the Supreme Court has passed on questions akin to but not decisive of the right to delegate. In those cases wherein the Supreme Court approximated the question, the facts are at such variance with those in case at bar that in the search for the answer we must resort to and rely upon cases in lesser courts and the parity of reasoning in our examination of cases analogous to but not exactly like case at bar.

The Supreme Court has dealt with questions that go almost to the very heart of "delegation of duty" as in case at bar; but always under other descriptions and legal definitions or terms,—such as: power of control, occupation of workman, whose work was being done, whose duty involved, pro hac vice, who received services, master and servant, vice-principal, loaned servant, agency, etc.

It is the contention of appellant that the railroad could not delegate this duty to anybody; that its duty to comply with the provisions of its charter was an agreement with the State and was a personal, positive, non-assignable responsibility; that in doing what it did do, it did not devest itself of the legal responsibility imposed upon it by its franchise, it simply took a chance and flirted with the consequences, but it did not escape the burdens flowing from its breach of duty; and that the independent contractor it placed in charge of said repairs was its agent or vice-principal.

At the very threshold we propose to demonstrate that throughout the decisions cited, whether ordinary

master and servant problems, or those under the Federal Employers' Liability Act, or questions arising under the Jones Act, involving seamen or stevedores, or those involving independent contractor—one and all—there runs a thread of unity, or as one authority observed—"a common core", by which unerringly the true and correct relationship of master and servant can be determined, and by which criterion the correct solution can be obtained as to whose servant is the particular workman. The answer does not depend on who hired, who paid, or who could discharge the servant. The answer is obtained by establishing: Whose is the work, whose is the "power of control", whose is the legal duty to see that the premises whereat, or the tool with which, the work was done were reasonably safe for the workman, or whose was the non-assignable legal responsibility to discharge the duty in question, or who rendered and who received the services. Mere relationship of employer and employee is not the criterion, the occupation of the workman at the time of the injury may determine the question. In fact, there may be no contractual relation —a member of the public is protected by reason of the franchise and the statute.

In the beginning and before we delve into the cases, appellant desires to submit to the Court that a railway corporation receiving a franchise from the state, with the high and peculiar privileges attaching to a corporation incorporated to discharge a public duty as well as to subserve a private benefit, cannot shift upon others the duty and responsibility of a personal exercise of the corporate powers granted. It may lease the road, when

constructed, to another corporation, whose road, with its own will make a continuous line. It may employ others to do certain repairs, maintenance and the like; but it cannot avoid responsibility by simply permitting another party to perform and execute the functions imposed upon it in its charter. We submit that the Court will find a clear line of distinction where there seems to be confusion and the line of distinction can be determined by ascertaining wherein there is an element of duty and wherein the element of duty is omitted. In the former the railroad cannot delegate the duty. In the latter there is some question for even in those cases other principles of law might prohibit the delegation. In case at bar, the element of duty stems from both the franchise and the Federal statute.

## The Test

At this point let us state that delegation is abdication. And that in all cited cases regardless of the several doctrines under which they are classed the point to be gathered is that "power of control" is the basis of holding the carrier. And what was the "occupation" of the workman—"whose work was being done"—is the basis of the workman's protection. These are the Tests.

So, in a paragraph, let us state succinctly the case at bar: The duties and obligations resting on appellee stem from the franchise granted to it by the State and from the Federal Employers' Liability Act enacted by the Congress; and the liabilities chargeable to appellee spring from the infraction by it of the franchise and the

statute,—under the doctrine of power of control, which duties were personal, positive and non-delegable; and if appellant sustained injuries while engaged in duties in the furtherance of interstate commerce by reason of his "occupation", the questions for determination are questions of fact for a jury under the statute.

Roberts Federal Liability of Carriers, 2d Edition, Vol. 2, page 1475, says:

> "The general rule is that if a railroad of a common carrier is a highway of interstate commerce, its roadbed, tracks, bridges, tunnels and culverts are instrumentalities of interstate commerce, so that employees that take part in the maintenance and repair of them are engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. Track laborers and section men are included in this class; so also are carpenters and bridge workers. The status of such men is not affected by the fact that these instrumentalities are also used in intrastate commerce, or that the line of the carrier lies wholly within the limits of a single state."

In Choctaw, O. & W. Railroad v. Wilker, supra, 16 Okla. 384, 84 Pac. 1086, 3 L.R.A. (N.S.) 595, the Court said:

> "1. We take the rule to be elementary that, where the statute imposes upon a railroad corporation a certain duty, it cannot escape liability for a failure to perform that duty, or a damage occasioned thereby by delegating that authority to an independent contractor," (citing 1 Thompson on Neg., p. 278).
>
> "2. We have carefully examined the cases submitted by counsel for plaintiff in error (the Railroad) to sustain their contention, but we think in

those cases there is a decided difference in the facts from those in case at bar. In all these cases, we think without exception, the element of a public duty is omitted."

"3. We do not think that any of these cases would sustain the contention that where a railroad company, under the law, was charged with the duty to the public, and the injury complained of resulted from a failure to properly discharge that duty, their liability could be avoided by showing that the work was done under an independent contract."

This case revolved around the following situation: The railroad company charged with the duty of keeping a highway in a reasonably safe condition for travel at the point where the highway intersects the right of way, and further required, when making alterations by means of which the highway may be obstructed, to provide and keep in good order suitable temporary ways to enable travelers to avoid or pass such obstructions: cannot, where a party is injured in consequence of its failure to discharge these duties, escape liability by showing that the work was done by other persons under an independent contract.

## Delegation of Duty Doctrine

The duty required of the master concerning the servant is expressed succinctly in the following cases:

Panama R. Co. v. Minnix, C. C. A. Canal Zone, 282 F. 47, holds:

"The duty of making reasonably safe the place where an employee works and the duty of warning him of unsafe conditions, are duties of the master,

who cannot avoid responsibility for their non-performance by delegating them to a fellow servant."

Chicago Junction R. Co. v. King, Ill., 169 F. 372, 94 C. C. A. 652, affirmed, 32 S. Ct. 79, 222 U.S. 222, 56 L. Ed. 173, holds:

> "The duty of seeing that no cars used in interstate commerce are hauled by a railroad company unless equipped with the required safety appliances is imposed on the company, and cannot be evaded by delegating the same to the conductor of a train or other employee whose action in that respect is that of the company."

Wilczynski v. Pennsylvania R. Co., 100 A. 226, 90 N. J. Law 178, holds:

> "Where method of doing work has direct bearing on safety of servant, the duty is on the master to use reasonable care to provide a safe method; and he cannot escape liability by intrusting its performance to others, and in action for death of servant of railroad when a steel beam being loaded on a lighter fell upon him while he was working on the boat at his foreman's orders, it was immaterial what relation existed between the boat owner and the railroad."

Roberg v. Houston & T. C. R. Co., Tex. Civ. App., 220 S.W. 790, holds:

> "A railroad furnishing a wrecking crew with chains of various and ample strength is not liable for the death of an experienced foreman from breaking of a chain of insufficient strength which he selected."

Blessing v. Camas Prairie R. Co., 100 P. 2d 416, 3 Wash. 2d 266, holds:

"A railroad was under a nondelegable duty to provide a locomotive fireman with a safe place in which to work, and owed the fireman a continuing duty of exercising reasonable care in keeping the place safe."

Porter v. Terminal R. Ass'n of St. Louis, Ill. App., 65 N.E. 2d 31, 327 Ill. App. 645, holds:

"A master owes continuous, nondelegable and affirmative duty to furnish servant reasonably safe working place, machinery, and instrumentalities, though servant is sent on another's premises to do his work."

Re: non-delegable duties, 39 C.J. 285, Section 412, says:

"Certain primary or absolute duties are imposed by law upon the master, such as the provision of a safe place to work, the furnishing of safe and suitable appliances and instrumentalities for work, the employment of a sufficient number of servants, the selection of competent servants, and the establishment of proper rules and methods of work. The performance of such primary or absolute duties cannot be so delegated by the master as to relieve him from liability for the consequences of a failure to discharge them, but the negligence with regard thereto of one to whom their performance is intrusted by the master is regarded as that of the master for which he is responsible, even though they are intrusted to a person of approved skill and fitness."

Citing:

Brady v. Chicago Ry. Co., 114 Fed. 100;

Camenzind v. Freeland Furniture Co., 89 Ore. 158;

California Navigation Co., 110 Fed. 670:

Central Trust Co. v. Wabath Ry. Co., 34 Fed. 616;

Howard v. Denver Ry. Co., 26 Fed. 837.

39 C.J., p. 322, Sec. 445 on Delegation of Duty, says:

> "The duty of the master is a positive obligation resting upon him, and he is liable for the negligent performance of such duty whether he undertakes its performance personally or delegates it to another. So the duty of the master in respect to reasonably safe instrumentalities and place of work is a continuing one, the duty of inspection resting upon the employer in consequence thereof cannot be delegated so as to relieve him from the consequences of a failure to inspect or of an inadequate inspection, (citing numerous cases from U. S. Supreme Court, U. S. Circuit Courts and various state courts)."

In 23 A.L.R., p. 1003, in an extensive note upon non-delegable duty, the following occurs:

> "It is well settled that the duties to which the grantee of a franchise or other special privilege, authorizing certain work, becomes subject, either expressly or by implication, are absolute in such a sense that he cannot, by employing an independent contractor to execute the work, devest himself of his liability in respect of their proper performance."

The rule is stated in Restatement of Torts, Sec. 428, as follows:

> "An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed

to do work in carrying on the activity, (Venuto v. Robinson, 118 F. 2d 679, 3rd Cir. N.J.; Kemp v. Creston Transfer Co., 70 F. Supp. 521)."

Where work to be performed by an independent contractor is dangerous, as in case at bar, or the obligation rests on the employer to keep the subject of the work in safe condition as in case at bar, the general rule exempting the employer from liability for personal injuries to an employee of the contractor does not apply, and it is the settled law that an owner has the nondelegable duty to furnish workmen a safe place in which to work and safe material with which to work, so that appellant is not precluded from recovering from appellee merely or solely because appellant was not the immediate employee of appellee, nor the fact that Gilpin Construction Company was an independent contractor of itself does not preclude the appellant from recovering from the appellee in this action.

Fisher v. Portland Railway L. & P. Co., 74 Ore. 229;

Warner v. Synnes, et al., 114 Ore. 451.

In Vickers v. K. & W. V. R. Co., supra, the plaintiff and others were employed by defendant as laborers in building a railroad which was not completed but some trains were being run while the work of construction was still going on. The plaintiff by arrangement of defendant was carried to and from his place of employment along the road and to and from his boarding place on the work train of defendant. Along the track by permission of defendant a derrick used in loading stone

had been erected by an independent contractor. On one trip, guy ropes supporting the derrick sagged over the track and dragged the plaintiff off between the car and the engine. The contractor was negligent in causing the injury to plaintiff. The defendant relies on the proposition that the negligence being primarily that of the independent contractor its whole duty to the plaintiff to provide him with a reasonably safe place to work was discharged when it employed a competent independent contractor and permitted him to suspend the guy ropes in question over its track. The Court said: "We are brought face to face with the question, What is the duty of a railroad company under the circumstances of this case?" The syllabus of the case is borne out by the text and is as follows:

> "1. The general rule, subject to exceptions, is that, where one has contracted with a competent and fit person exercising an independent employment to do a piece of work, not in itself unlawful, or of such a nature that it is likely to become a nuisance, or to subject third persons to unusual danger, according to the contractor's own methods, and without being subject to control, except as to results of his work, will not be answerable for the wrongs of such contractor, his subcontractors, or his servants, committed in the prosecution of such work.
>
> "2. But, with respect to railroads, the nonassignable duty of the master to provide its servant a reasonably safe place to work extends to the entire track over which the servant is required to pass in the discharge of his duties; and this is a positive duty, which, although intrusted to an independent contractor, will not absolve it from liability for the nonperformance thereof.

"3. Where one is employed by a railroad company as an independent contractor, to do certain work in the construction of its roadbed, in all matters incident to the use of its tracks permitted by such company the contractor and his workmen represent the will of the company, and its responsibility remains.

"4. Although a railroad company employs a competent independent contractor to do certain work, and, in the execution of his contract, permits him to suspend over its tracks guy ropes, the effect of such contract, with respect to such ropes, is simply to delegate to such independent contractor performance of a nonassignable duty of such company to maintain a reasonably safe place for its servants to work, rendering it liable for his negligent performance thereof.

"5. Where a railroad company has permitted the erection of guy ropes over its tracks, by an independent contractor employed to perform a part of the work of constructing its roadbed, it will nevertheless be rendered liable for any negligence on the part of such independent contractor in relation to such guy ropes, whether competent or not, although it may not have had actual notice of such negligence in time to have avoided injury to its servant resulting therefrom. In such cases the law requires inspection and tests adequate to avoid dangers.

"6. Where a railroad company intrusts performance of any of its positive duties to its servants to an independent contractor, his relationship to the defendant becomes that of vice principal, and his negligent performance of those duties becomes notice to his principal, rendering it liable for injuries to its servants, resulting therefrom."

Pedersen v. D. L. & W. R. Co., supra, deals with the repair of tracks and bridges and the nature of the duty resting upon the carrier. The facts involved an employee

killed while carrying a sack of bolts or rivets to be used in repairing a bridge. The ruling of the lower court required a determination by the Supreme Court of the United States as to whether or not the work involved interstate commerce within the meaning of the Federal Employers' Liability Act. The point made was that the plaintiff was not at the time of his injury engage in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. The court said that there was no merit to that contention. That the repair of the bridge was a part of the work, or in other words, it was a minor task which was essentially a part of the larger one. In passing upon the question the Supreme Court said:

> "Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated

> into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?" (citing cases)

So, therefore, the trestle in question being indispensable to interstate commerce by the appellee and by law must be kept in repair which obligation rested upon the appellee or as the Court said: "Indeed the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency . . . in its . . . track, roadbed . . . or other equipment' "— and that being true we submit that the duty to perform that work is a personal one and the appellee is liable for injuries sustained by appellant and for appellee to contend otherwise is a pure quibble.

The warranty of a safe place for workmen to perform their services covers all workmen which term includes not only every servant directly employed by the railroad to keep in safe repair its roadbed, railway lines and bridges, but also those men indirectly employed who perform the same service usually performed by members of the regular railway construction crew. And the reason is that these services are of direct necessity and benefit to the railroad and its owner and imposed by franchise upon the railroad.

Appellant was performing a duty essential to interstate commerce, a duty the State of Washington had imposed on the appellee. Its liability to its employees

does not rest upon its contract of employment, but of repairing and keeping in safe condition the railroad's instrumentalities of interstate commerce with its consent. It responsibility to perform this duty cannot be contracted away.

Nor can the appellee slough off its liability to those who do the railroad's work by bringing an intermediary contracting employer between itself and those workers.

Appellant is entitled to this protection regardless of the fact that he was employed immediately by another than the common carrier. For these purposes he is in short a railroad carpenter, because he is doing a railroad carpenter's work and incurring the railroad carpenter's hazard. Moreover, to make the policy effective the grantee of the franchise is brought within the liability which is peculiar to the employment relation to the extent that and because every one involved undertakes the service of the railroad.

For convenience, perhaps, the railroad may be at liberty to conduct its business by securing the advantages of specialization in labor and skill brought about by modern divisions of labor. However, it is not at liberty by doing this to discard its responsibilities imposed by franchise, one of which is the duty to maintain its railway lines and roadbed, tracks and bridges in a reasonably safe condition for its use in interstate commerce and to furnish the workmen a reasonably safe place in which to do this work. It is peculiarly and exclusively the obligation of the railroad and it is one it cannot delegate.

True that these non-delegable duties are sometimes placed in the hands of others, and to all intents and purposes things move along as smoothly and many times perhaps more smoothly than if actually performed and executed by the railroad; but, in every case, the ultimate power,—"power of control", remains in the railroad, because it did not have the legal right to relinquish any power or duty of its franchise; and, in every such case, when put to the test it has always been found that the railroad not only could not but did not lose "the power of control". To let another one use it, is fraught with danger and when loaned or let to another for the convenience, benefit or what-not of the railroad, said railroad must bear the burdens, for the holder of the franchise always and exclusively retains the ultimate "power of control", which it cannot abdicate.

## Power of Control Doctrine

Our next case, A. C. L. v. Tredway, gives the answer on the theory of who possessed in law the ultimate "Power of Control"; not who exercised it. Tredway was a signalman, hired, paid and subject to discharge by Southern Railway Company, a common carrier; by contractual arrangements between Atlantic Coast Line and Southern Railway, Tredway was hired to care for signal system over which A. C. L. had jurisdiction and power of control; Tredway was killed by negligence of A. C. L. railroad. Under the rule laid down in this case the answer is that appellee in case at bar is liable because of the "Power of Control" doctrine.

In this case, A. C. L. Railway v. Tredway, the facts briefly were that A. C. L. Railway was senior in location at Emporia. Southern Railway wanted to cross A.C.L. and as a condition for that privilege, A. C. L. exacted of Southern Railway the cost of maintenance of the signal system, hiring and paying the employees, with the power to discharge them. One of the signalmen was killed by A. C. L. This action was instituted and A. C. L. claimed Tredway was not its employee and Southern Railway to blame. Court held against A. C. L. on "Power of Control" theory holding that:

1. A railway company cannot assign to an independent contractor the duty of maintaining signal lights along its railway tracks, so as to relieve it from liability for injury to a servant while in the performance of such duty.

2. The relationship of master and servant is determined by the question whether or not one discharges the duties of a servant to the other, which service is accepted by the latter, or is of a character with respect to which the duty of the one sought to be charged as master is non-assignable.

3. A railroad is the employer of a man injured while rendering services to it in and about the signaling of trains, although, by virtue of contract between the railway and another, he is employed and paid by the other which also has the right to discharge him.

4. Where the duty is non-assignable, the master cannot escape the duty resting upon him by relinquishment of control of the servant, or by otherwise making it impossible for himself to perform the duty.

5. The ultimate power of control was possessed by the A.C.L. through its contract with Southern

Ry. which company was merely the agent of the A. C. L. to exercise the immediate control of Tredway, with the ultimate power of control remaining vested in the A. C. L.

6. The A. C. L. had the power of control in question originally. It need not have parted with it. If it did, partly or wholly, it could not thereby devest itself of the legal responsibility it was under to exercise such control.

Judgment for plaintiff against the defendant was affirmed.

Certiorari was sought by the railroad in this case, but was denied by the U. S. Supreme Court on January 14, 1918, 245 U.S. 670, 62 L. Ed. 540, 38 Sup. Ct. Rep. 191.

In the Tredway case, the question was whose duty was it to furnish Tredway with a safe place in which to do his work and to determine the answer to that question, it was necessary to ascertain who had the right to control, not who did control. The right rested with the Atlantic Coast Line Ry. On its shoulders was the duty and the responsibility to see that Tredway had a safe place in which to work. In contracting with the Southern Railway obligating it to hire men to do the work and to pay them and to discharge them if it so desired did not in the slightest degree lessen the duty imposed upon the Atlantic Coast Line to see that its responsibilities were properly performed.

The test is not whether the contract reserves to the railroad the power of control over the employee on the work at the time the workman was injured; the test is

whether the duty to keep in repair its tracks and trestles imposed by the franchise upon the railroad is one that the railroad can assign to any one and absolve itself from any liability flowing from the failure to furnish a safe place in which to work to those making the repairs.

This exercise of right of control or power of control does not stem from the contract between the railroad and the contractor but from the franchise by the state to the railroad. The franchise itself clothes the railroad with the power of control which includes exercise of control. These powers are granted by the state and without the consent of the state the railroad cannot abdicate these rights to any one. So in the repair of Rockton Bridge it was the work of the Spokane-Portland & Seattle Railway Co. and it alone had the power of control and the work was its work and it must bear the responsibility for appellant's injuries.

As said before during the time the repairs were being made on the Rockton Bridge, there was no cessation of interstate traffic; the trains of the appellee continued to run, and train orders were issued to all including the foreman of the crew of which appellant was a member, i.e., the appellee at all times had complete and absolute control as a proprietor of the premises and at any time it could stop or continue and determine the way in which the work should be done—none of these could it abdicate. Gilpin Construction Co. could only do this repairing as the agent or vice principal of appellee, (18 R.C.L. 784).

## Vice-Principal Doctrine

We now pass to that phase of the law dealing with the master's obligation to the servant with respect to safe places in which to work wherein the master does not act directly, but attempts to perform his duty through another. A master's duty to furnish, when necessary, a reasonably safe structure or scaffold on which to work is a personal, positive, absolute obligation, and he cannot, by delegating it to another, absolve himself from liability for its non-performance. The master is answerable for the negligent performance of such duty, whether he undertakes it personally or through an agent, and this is true although the agent may, as to other matters, be merely a fellow servant. Any person who performs this duty for the master is the vice-principal of the master.

Sullivan v. Hannibal & St. Joseph R. Co., 107 Mo. 66, 28 A.S.R. 388;

C. & A. Ry. Co. v. Maroney, 170 Ill. 520, 62 A.S.R. 396;

Gann v. Railroad Co., 101 Tenn. 380, 70 A.S.R. 687;

Ell v. Nor. Pac. Ry., 1 N.D. 336, 26 A.S.R. 621.

The case of Sullivan v. Hannibal Railroad, supra, was an action for damages for injuries resulting to plaintiff in consequence of the falling of a portion of a scaffold or staging upon which plaintiff and other carpenters, under Prather, their foreman and the agent of the defendant, were engaged in removing an ice-house of the latter, which was to be erected at another place.

The foreman, Prather, stood in the relationship, not of a fellow servant of the plaintiff, but as the vice-principal, the alter ego of the defendant railroad company and the Court held that such person having charge of laborers engaged in the removal of a railroad company's building is a vice-principal of the company, and when such person as in this case orders a laborer to use a defective staging and injury results to the latter from such use, the company is liable therefor, and the Court said that although the laborer injured knew, to a certain extent, of the defect in such staging, but did not know the danger he was subjected by reason of the defect, while the foreman did know it, or could have known it if he had done his duty, the company will be liable for the injury resulting from the fall of such defective staging.

A foreman of a gang of railway workmen engaged in repairing trestles and bridges, and having power to employ and discharge such men and to oversee and to direct their work, is a vice-principal of the railway company, and the railway company is liable for his negligence whereby one of the workmen receives an injury,

(Bloyd v. St. Louis etc. R. Co., 58 Ark. 66, 41 A.S.R. 85).

The doctrine of vice-principal begins and ends with the personal duties of the master. It is the master's duty to provide a reasonably safe place in which to perform his work, and to provide and keep in proper repair reasonably safe tools, appliances and machinery for the accomplishment of the work necessary to be done,

(Hough v. T. & P. Ry. Co., 100 U.S. 213, 25 L. Ed. 612).

The true and decisive test of a vice-principal is not the relation of the employees as to each other, but the character of the act done or services performed. When a servant is entrusted with some duty of the master, which the latter owes to another servant, and which cannot, therefore, be delegated by the master, and the duty is not performed, or is negligently performed, the negligent servant is a vice-principal, for he must be regarded as the agent or representative of his employer, (B. & O. Ry. Co. v. Baugh, 149 U.S. 368, 37 L. Ed. 772).

If a servant of a railway company is entrusted with the duty that belongs to his principal as a primary duty, he is, in legal effect, a vice-principal or representative of the master, who is answerable for his negligence, whereby another servant is injured, (N. P. Ry. Co. v. Herbert, 116 U.S. 642, 29 L. Ed. 755).

In the Hough case, the Court said:

> "Those, at least, in the organization of the corporation, who are invested with controlling or superior authority in that regard represent its legal personality; their negligence, from which injury results, is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant, who has been injured, without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation."

In the Baugh case, the Court said:

> "So, oftentimes there is in the affairs of such corporation what may be called a manufacturing

or repair department, and another strictly operating department; these two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has the control of it, is as to it in the place of the master. But this is a very different proposition from that which affirms that each separate piece of work in one of these branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice principal or representative of the master."

. . . . .

"If the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employe, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the survant, then negligence in the act is the negligence of the master."

In the Herbert case, the Court said:

"It is the duty of the employer to select and retain servants who are fitted and competent for the service; and to furnish sufficient and safe materials, machinery or other means by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred so as to exonerate him

> from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skillful colaborers, or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him. This doctrine has been so frequently asserted by courts of the highest character, that it can hardly be considered as any longer open to serious question."

A master is liable for the negligence of a subordinate to whom he has entrusted the control of his entire business, or a separate or distinct branch of it, where he exercises no discretion or oversight of his own, and the agent's negligence consists in failing to supply and maintain a safe place or safe instrumentalities for the conduct of the business, for such subordinate represents the master, and the neglect of the agent is the negligence of the principal, (Willis v. Oregon etc. Navigation Co., 11 Ore. 257).

In the Willis case, the Court said:

> "To constitute one vice-principal, or superior servant, the master must have committed to him the substantial control of the business, and the power to do all acts necessary to its conduct." (citing cases).

Then the Court approved language used in Mullan v. Phila. and Southern Mail Steamship Co., 78 Penn. St. 25, as follows:

> "Where the master places the entire charge of his business, or a branch of it, in the hands of an agent, exercising no discretion, and no oversight of his own, the neglect of the agent of ordinary

> care in supplying and maintaining suitable instruments at cities for the work required, is a breach of duty for which the master should be liable. The negligence of the agent with such power becomes the negligence of the master."

The Court then said that Mr. Justice Deady laid down the rule as follows:

> "Where the servant is authorized and required by his employment to furnish or provide suitable material or appliances for the work in which his fellow servants are engaged, whether under his direction or otherwise, and one of them is injured by reason of his negligence or omission in this respect, the common master or employer is responsible in either case." (Referring to several cases).

## Independent Contractor Doctrine

We now submit four cases from U. S. Circuit Courts wherein the facts are similar to those in case at bar, i.e., railroads engaged in interstate commerce employed independent contractors to perform their duties and employees of the contractors were injured and the railroads were held liable. These cases are known as the Margue, Cimorelli, Roth, and Barlion cases.

In Erie Railroad Company v. Margue, supra, there was involved a contract between the railroad and the Dixon Construction and Repair Company, under which contract the construction company with its own employees undertook to maintain the tracks, roadway and structures of the railroad. The contract was similar in many respects to the one involved in case at bar. Margue, an employee of the construction company, was

injured while working on the railroad tracks of the railroad and brought suit against the railroad for his injuries and the defense was that he was an employee of an independent contractor. The case turned on the effect of a contract between the railroad and construction company which the Court held to be void. In passing on the case the Court, among other things, said the maintenance of defendant's railroad tracks was essential to the exercise of its franchise rights, which it undertook to delegate to a construction company.

The Court also said that:

> "It might be well argued that the duty of a railroad company to maintain its right of way, over which it and it alone operates its trains, cannot be delegated to another, so as to relieve the company of any part of its responsibility therefor. . . . Certainly, not as to the public which it serves, and perhaps not as to those who work upon its tracks."

The Margue case could very well have been determined by the rule laid down in the Linstead case, i.e., Whose work was being done? In the Margue case he was doing the work of the Erie Railroad Company and in the case at bar appellant was doing the work of the S. P. & S. Railway Co., and that being true, the S. P. &. S., the C. & O. Railway and the Erie Railroad Company would stand in the same position and be subject to liability for the injuries sustained by the employee in question.

Cimorelli v. N. Y. C. Railway Co., 148 Fed. 2d 575 (1945; C. C. A. 6th Ohio), is a typical case involving the exact question here whether one employed by an

independent contractor may proceed against the railroad company as its employee under the Federal Employers' Liability Act. Briefly the facts were that the railroad contracted with the United States to operate in the railroad's yards a temporary place for war material in transit, identity of lading of inbound cars was to be preserved when stored and when forwarded and railroad contracted with construction company to unload and reload the cars and the railroad's superintendent selected the place in the yards where and fixed the time when cars were to be unloaded or reloaded, and had to approve in advance every item of cost and necessity of purchase of equipment; the railroad was held liable under the Federal Employers' Liability Act.

The court was of the opinion that the work involved was of such nature that the railroad was unable to devest itself of control over the details of accomplishments and was so interwoven with the work of operating a railroad that the railroad could not devest itself of control. In brief the court held that the nature and character of the work was such that its performance could not be committed exclusively to the construction company.

We suggest that the same is true of case at bar; the railroad continued to use the trestle in its interstate commerce and the nature and the character of the repair work was such that its performance could not be committed exclusively to the construction company, and as in the Cimorelli case, appellant was an employee of the railroad and not Gilpin Construction Company since

the nature and character of the repairing of the trestle was such that its performance could not be committed exclusively to the construction company, but the power of control was always with the railroad, which power it could not abdicate.

In the Cimorelli case the court said that part of the work to be done by the construction company was in the railroad yards of appellee where there was presumably frequent movement of cars and appellee controlled the place where the work was to be performed. No part of the premises was surrendered to the construction company. The whole project involved many interdependent details, the control of any one of which could not be surrendered without disorganization of the whole. From the very nature of the work its performance could not be committed exclusively to the discretion of the Duffy Company, and the court held that if the existence of the right or authority to transfer or control appears, the contractor cannot be independent, citing Atlantic Transportation Company v. Coney's Second Circuit, 82 F. 177; Reynolds v. Braithwaite, 131 Pa. 416, 18 A. 1110.

The court also said that the first question is whether appellee for whom the work was being done, had given up its proprietorship of the particular business to the Duffy Construction Company and had thus divested itself of the right of control, to the extent that it had no longer a legal right to determine the work or to direct it.

It is suggested that the rules laid down in the Cimorelli case apply to the case at bar, for in case at bar the repair of its tracks and bridges was an essential

element exacted of appellee in its franchise and the maintenance of these instrumentalities was essential to performing the functions granted appellee by its franchise. The power of control is a legal question which we submit could not be abdicated by the appellee, nor could it be exercised by the independent contractor. As in the Cimorelli case, so in case at bar, the railroad controlled the place where the work was to be performed and in which there was a frequent movement of trains and all the work the contractor had to perform had to be done subordinate to the prior right of the railroad in the operation of its trains. Furthermore the control of the bridge and tracks could not have been surrendered without disorganization of the whole and naturally from the very nature of the work for which the contractor was hired, could not be committed exclusively to the discretion of the contractor. In this connection it must be borne in mind that the contractor received train orders giving the time of trains passing over said trestle where the repair work had to be performed so that there would be no interference with interstate commerce.

In Pennsylvania Railroad Company v. Roth, supra, there was involved a contract between the railroad company and an independent contractor for work on a cost-plus basis pertaining to unloading inbound cars, assemblying and placing dunnage on ground for piling and storage of inbound shipments, stenciling, marking and placing in storage in said yards inbound shipments, etc. Roth was an employee of the independent contractor and while employed in the work sustained injuries and brought suit against the railroad company under the

Federal Employers' Liability Act. The contention of the railroad was that the employer of Roth was an independent contractor with the necessary result that Roth was not an employee of the railroad and not covered by the provisions of the Federal Employers' Liability Act. The railroad relied upon the ruling of the Supreme Court in Chicago, Rock Island and Pacific v. Bond, 240 U.S. 449, 60 L. Ed. 735. Appellee Roth relied upon Cimorelli v. N. Y. C. Railway Co. The court followed the ruling in the Cimorelli case, holding that the situation in the Rose case was substantially the same as was in the Cimorella case. Certiorari denied, 332 U.S. 830, 92 L. Ed. 404, 68 S. Ct. 208.

The Pennsylvania Railroad Company v. Barlion, supra, involved a situation similar to the Cimorelli and Roth cases. In this case the railroad agreed with the government to provide storage yards on its line and the railroad employed an independent contractor to unload cars, to stencil, mark, and store inbound shipments, to remark, reload outbound shipments, all as required by the government, and to do other incidental work required by the railroad. Barlion was employed by the independent contractor and while doing this work was injured and brought an action against the railroad under the Federal Employers' Liability Act. The respective parties made the same contention as made in the Cimorelli and Roth cases and as made in case at bar. The court said that the controversy involving the status of an independent contractor must be decided on its peculiar facts and ordinarily no one feature of the relationship is determinative. The court stressed the right

of control and not the exercise of control, saying that the right of railroad's control over the contractor rather than exercise of control by railroad determines whether the contractor is an independent contractor so that the injured employee of contractor is not entitled to the benefit of the Federal Employers' Liability Act, and further held that under the facts as related, the contractor was not an independent contractor and injured employee of contractor was entitled to the benefits of the Federal Employers' Liability Act as railroad's employee. The judgment in favor of Barlion against the railroad was affirmed on appeal. The court held that the case was controlled by the Roth case and the court, as in the Roth case, said that each controversy involving the status of an independent contractor must be decided on its peculiar facts, holding specifically that the railroad had the right of control and that it is the right of control rather than its exercise that determines whether or not a contractor is an independent contractor, adopting likewise the holding in the Roth case by saying that:

> "The whole project involved many interdependent details, the control of any one of which would not be surrendered without disorganization of the whole, and that, from the nature of the work, its performance could not be committed exclusively by the railroad to the contractor engaged in doing the unloading and reloading work and rendering the other services in question. The railroad had this right of control in the instant case to the same extent as it would in the Roth case; and it is the right of control rather than its exercise that determines whether or not a contractor is an independent contractor."

We submit that the foregoing language fits the case at bar, for the Spokane-Portland & Seattle Railway Co. under its charter had the right of control and likewise it not only had the right of control but it exercised the right by its constant use of its trains, which right could not be surrendered without disorganization of the operation of its trains; and furthermore, the duty imposed upon appellee to keep its tracks and trestles in repair was a duty that it could not abdicate and in the performance of that duty it had to vouchsafe to the workmen who did the repair work a safe place in which to do that work.

We desire to adopt what one writer said about the Barlion case, it follows:

> "This case is of greater importance than at first meets the eye. If railroads are permitted to hire independent contractors to do most of their work railroads can avoid liability under the Federal Employers' Liability Act. Under workmen's compensation acts, courts watch employers for such evasions. Many employers would like to avoid liability under the workmen's compensation act and save premiums. If they were allowed to hire independent contractors who in turn would hire the men, thus avoiding compensation coverage, such employers could hire financially worthless independent contractors who in turn would carry no compensation, with the result that the employees of judgment-proof independent contractors would receive neither compensation nor common law collections.
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> "Similarly railroads could avoid liability under the Federal Employers' Liability Act by hiring contractors to do most of their work, and there is nothing in the law to prevent them from hiring financially worthless contractors. Such contractors would

not come under the Federal Employers' Liability Act as they are not railroads engaged in interstate commerce. Their employees in turn would have compensation rights only if they carried compensation coverage. Such independent contractors might well be financially worthless. With these possibilities in mind it should not lightly be held that claimants, who are doing exactly the same work as is often done by railroad employees, are simply employees of an independent contractor and therefore beyond the purview of the Federal Employers' Liability Act." (National Association of Claimants' Compensation Attorneys, Vol. 3, p. 206).

The same thought was expressed in Despatch Shops v. Railway Retirement Board, 153 Fed. 644, in dealing with a question pertaining to railway employees in a case brought under a different Federal Act. We quote:

> "It can be readily seen that the railroad would be free to take from under the act virtually all of their workers whose employment is in the supporting activities, through the simple expedient of setting up wholly owned corporate affiliates to perform these services. It is conceivable that everything from maintenance of way through engineering or book-keeping might be done by so-called 'independent contractors'; the application of this Act and of the other Acts passed for similar purposes and embodying the same language could be severely limited as to render them of little worth in achieving the purpose for which they were passed."

"Railroad cannot escape its charter obligations by a quibble such as this," said the Court in Philadelphia, Washington & Baltimore Railroad Co. v. Hahn, (Pa.) 12 Atl. Rep. 479. This was an action for personal injuries by Michael Hahn.

Facts: The railroad contracted with contractor Lafferty to move cars on Washington Avenue to various consignees and to bring them back empty to its yard. Contractor employed teams and men and exercised exclusive and independent control over them. While engaged in moving cars two sections of a train of empties collided and Hahn was hurt. Railroad contended it had legal right to delegate the hauling of cars and if injury was caused by contractor, the verdict should be for railroad as Lafferty was an independent contractor and the railroad was not responsible for his acts. Held:

> "The doctrine contended for on part of the plaintiff in error cannot be sustained. It contracted for the operation of a part of its road by horse-power, and, under this contract, asks to be relieved from all responsibility for the negligent acts of its contractor. We cannot agree with a proposition of this kind, for the principle, if established, might be the means of relieving the company from all its charter duties, so far, at least, as concerns the public safety. The mere question of the power by which its cars are to be moved is of no consequence. If it can contract for horse-power, so may it for steam, and it follows that it might relieve itself of all responsibility by contract with its engineers and conductors for the running of its locomotives and trains. It needs no argument to show that a railroad company cannot escape its charter obligations by a quibble such as this. The judgment is affirmed."

Philadelphia, B. &. W. R. Co. v. Karr, 38 App. D. C. 193, was an action by Karr against railroad to recover damages for injury to real estate. Railroad was authorized by Congress to construct a tunnel. Railroad con-

tracted with construction company to do the work, which was negligently done, resulting in damage to adjacent property. Railroad contended that contractor and not railroad was liable. The court held railroad responsible and upheld the verdict for plaintiff. Court, inter alia, said:

> "The liability of the principal is in each case dependent not upon the question of whether or not the tort is committed by an independent contractor, but upon whether the circumstances of the case are such as to prohibit the principal from contracting away his liability. In this instance, defendant acquired a right from Congress to construct the tunnel. The grant to defendant was a personal one. . . . The franchise carried with it the liability, and defendant, in accepting the privilege, accepted the liability which could no more be contracted away than could the franchise itself."

The Court also said that the rule to be gathered from the American cases as summarized by Thompson in his work on Negligence, 2d ed., sec. 672, was as follows:

> "It is that, whenever the independent contractor, in order to prosecute his work under his contract, must exercise, in whole or in part, a franchise granted by the legislature to his employer,—the railroad company,—the company must answer for his torts, because it is bound to see to the correct execution of the powers conferred upon it by the legislature. An enjoinment of this doctrine makes the company liable for all manner of trespasses of the contractor done while prosecuting the work under his contract; because in every such case he is acting in virtue of the franchise conferred by the legislature upon the railway company; namely, the franchise of building a railroad. Without the possession

> of that franchise, the railroad company could not be there by its own servants, nor could it be there by an independent contractor. In such a case the persons employed by the company to exercise its powers are deemed, in law, to be its servants or agents, and it is answerable for their trespasses."

Logically, the premise of the appellee would lead us to this conclusion: The railroad could delegate to Gilpin Construction Company *its duty "to maintain its railway lines and roadbed, tracks and bridges in a reasonably safe condition for its use in interstate commerce,"* and in case wrecks occurred killing hundreds of passengers, thousands of carloads of stock, maiming innumerable numbers of its train crews, etc., all due to the negligence of the contractor to whom all so injured must look. Or, let us limit the delegation to the repair of appelle's bridges, and wrecks occur—people and the train crews are killed—the logic of appellee's position would result in the same conclusion—which means that appellee shifts its duty onto another and without the consent of the state and all so injured must look to the independent contractor, irresponsible maybe, and, if so, then "without a hope of remuneration", as said in the case following.

In Lesher v. Wabash Navigation Co., supra, defendant employed independent contractor to furnish all the material and to do all the work for a price specified in the erection of a lock and dam. In the execution of the work, the contractors entered upon Lesher's land and took considerable timber for the construction of the work. Lesher sued the Wabash and not the independent

contractor. The defense was that the defendant was not liable for the acts of the contractor, which defense was sustained and on appeal reversed. The Court said:

> "The person who was injured by reason of acts done by those in the employ of the company, and in pursuance of their charter, had a right to look to the principal, who alone had authority to direct the acts to be done for compensation, and was not bound to seek redress from every servant who cut a tree or removed a stone. Were the rule otherwise, the company might, by the employment of irresponsible servants, compel the owner of the land to stand by and see it stripped of all that made it valuable, without a hope of remuneration. . . . . It may be true that it is the duty of the contractors to pay these damages, as they were bound by their contract to furnish the materials; and if so, they will be liable over to the company for the damages which the company necessarily has to pay for the acts of the contractors, but this ultimate liability of the contractors does not relieve the corporation from their primary liability to pay the damages occasioned to individuals by the exercise of the charter rights of the company, and in the mode, too, which the charter provides.
>
> " . . . The defendant is liable for the damages occasioned by the acts of the contractors which were authorized by the charter to be done by the company. As to the persons who have thus sustained damages, the contractors were the servants of the company, and their acts were the acts of the company."

The note to the foregoing case, among several authorities, cites City of Detroit v. Cory, 9 Mich. 185, and R. R. I. & St. L. R. R. Co. v. Wells, 66 Ill. 321, holding:

> "that a corporation employing contractors to execute its special franchise or privilege, and without whose

authority the acts of the contractors would be unauthorized and tortious, is, with respect to those acts of the contractors performed under its franchises, liable as a master for the acts of his servant."

## Whose Was the Work Doctrine

The Linstead case which follows, answers the proposition with respect to whose work was appellant doing. Let us bear in mind that appellant was a carpenter, hired, paid and subject to discharge by Gilpin Construction Company, the independent contractor in case at bar; by contractual arrangements between appellee and Gilpin, appellant and fellow workmen were repairing Rockton Bridge on the railroad of appellee; appellant was injured through the negligence of Gilpin in that a dangerous and unsafe place in which to work in making the repairs was furnished appellant. The question is: Who is responsible in damages to appellant? Under the rule laid down in the next case the answer is that appellee is liable because appellant was doing its work.

In Linstead v. C. & O. R. Company, supra, the U. S. Supreme Court, speaking through Mr. Chief Justice Taft, arrived at the solution of the problem by asking the question: Whose work was Linstead doing? Linstead was a conductor, hired, paid and subject to discharge by Big Four Ry. By contractual arrangements between Big Four and C. & O. Ry., Linstead and crew with Big Four engine and caboose hauled train of empties and loads of C. & O. over C. & R. Ry. tracks for Big Four connection. Linstead was killed through neg-

ligence of C. & O. train following Linstead train. The court held that the work was that of the C. & O. and that C. & O. was liable in damages for Linstead's death. Court said: We do not think that the fact that the Big Four paid Linstead's wages and that he could be discharged only by the Big Four, prevented him from being the servant of the C. & O. for the performance of this particular job.

So, in case at bar, we conclude that the work appellant was doing was the work of appellee. No one could have built that trestle, nor repaired it, but by virtue of the grant of the franchise. That duty was imposed upon appellee by the State of Washington, and it was the sole duty and the responsibility of appellee and it alone to vouchsafe the acquittance of that burden. The construction company was its agent or foreman, or as nowadays described, its vice-principal.

In case at bar appellant stands in the same relation to the appellee as did Linstead to the C. & O. Appellant in case at bar was doing the work of appellee. It was the duty imposed on appellee by its charter to see that Rockton Bridge was kept in repair. It was the duty of appellee to see that those who repaired the bridge had a safe place in which to do that work. The contract between the state and appellee could not be assigned to any one or abdicated in any way by appellee without the consent of the state. The franchise required appellee itself to perform the duties imposed upon it, and the work appellant was doing was the work of appellee.

## Franchise Doctrine

In Thomas, et al. v. West Jersey R. Co., 101 U.S. 71, 25 L. Ed. 750, Mr. Justice Miller in delivering the opinion of the Court said:

> "Where a corporation like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."

In Knahtla v. O. S. L. Ry. Co., 21 Ore. 136, this question of delegation of duties imposed by franchise was settled long ago in Oregon by the Supreme Court speaking through Justice Hon. Robert S. Bean, later a U. S. District Judge of the District of Oregon. It was for personal injuries due to negligence of the defendant and its servants. The defense was floods beyond its control, fellow servant and contributory negligence. The court in classic, terse language said:

> "There is no doubt that it is the duty of a railroad company to furnish for the use of its employes a reasonably safe track, which necessarily includes bridges, and to exercise reasonable care to keep and maintain the same in a good and safe condition; to cause as frequent and thorough inspection of its roadbed and track as under the circumstances may reasonably be necessary for the purpose of discovering any defects therein; to exercise care in the

selection and retention of its servants, and to adopt such rules and regulations as may reasonably be necessary to guard against accident; and if the master fail to perform any of these duties and a servant is injured, he is liable in an action for damages suffered by such servant, and any duty which the master is required to perform for the safety of his servant cannot be delegated to any servant of any grade so as to exempt the master from liability for an injury resulting to a servant from its nonperformance. (Anderson v. Bennett, 16 Or. 515; Miller v. S. P. Co., 20 Or. 285)."

In the Miller case (Miller v. Sou. Pac. Ry., 20 Ore. 285), referred to by the Court, Chief Justice Lord said:

"We begin by saying that the principle that any duty which the master is required to perform for the safety and protection of his servants cannot be delegated to any servant of any grade so as to exempt the master from liability to a servant who has been injured by its non-performance, cannot be questioned. Nor can it be questioned that among these duties are not included the duty of a railroad company to keep its road-bed and track, rolling-stock, tools, machinery and appliances in good and safe condition; to cause as frequent and thorough inspection of these as can be done consistently with the conduct of its business for the purpose of discovering any defects that may occur from accidental causes, or the effects of wear and tear, or the progress of decay; to exercise care in the selection of its servants, and in their retention in its service; and to adopt such rules and regulations as are calculated to guard against accidents, and to make the servants in its employ reasonably safe. Our inquiry then is: Was the character of the act performed by the servant such an act as the law implies a contract duty upon the part of the master to perform?—for if it was, then such servant, in

respect to that act, ceases to be a servant, and becomes an agent or vice-principal."

In Oregon v. Portland General Electric Company, supra, the Supreme Court adopts the rule that a railroad corporation can exercise no power or authority which is not granted to it by the charter under which it exists, or by some other act of legislature which granted that charter. That it is universally held that all grants of a franchise are to be strictly construed against the grantee and that nothing passes by implication. That a railroad corporation to which a franchise has been granted with no power to transfer, has no power to transfer and a transfer is void, and does not relieve the franchise of any of the burdens imposed by the act of creation, and that where a railroad corporation has granted to it by charter a franchise intended in a large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantee of the franchise of the burden which it possesses, is a violation of the contract with the state, and is void as against public policy, and that such corporation cannot absolve itself from the performance of its obligations wihout the consent of the legislature.

To uphold its decision the court cites many cases from the Supreme Court of the United States and many state courts.

## Breach of Statute Doctrine

Let us pursue this matter a step further: Surely the requirements of a franchise are as obligatory and on as high plane as the provisions of the Safety Appliance Act, if not higher. And a failure to comply with the requirements of the Federal Safety Appliance Act is an actionable breach of duty toward travellers on highways as well as toward employees and passengers. So in case at bar, where the franchise made it the duty of appellee to maintain and keep in repair its tracks and bridges and where it was likewise the duty of appellee to see that a safe place was provided to those doing its work,— its failure to comply with its franchise, we maintain, is an actionable breach of duty toward appellant which appellee cannot successfully challenge no more than it could challenge any breach of the statute.

Brady v. Terminal R. Assoc., 303 U.S. 10, 82 L. Ed. 615;

Fairport P. & E. Railroad v. Meredith, 292 U.S. 589, 78 L. Ed. 1446;

L. & N. Railroad v. Layton, 243 U.S. 617, 61 L. Ed. 931, 37 S. Ct. 456.

Mr. Justice Hughes, in Brady v. Terminal R. Association, sums up the situation. This was an action under the Safety Appliance Act against the Terminal Railroad Association by Brady, an employee of the Wabash Railroad, which railroad he first sued and judgment reversed on the ground that the Wabash had not accepted the car and was not responsible, (83 A.L.R. 655). Thereupon the present action. The Court held that:

1. "The obligation to provide secure handholds on the roofs of freight cars, imposed by the Federal Safety Appliance Act, is owed to the employee of another railroad company whose duty it is to inspect cars tendered to his employer for transportation."

2. "The duty imposed by the Federal Safety Appliance Act is an absolute one; and a railroad company is not excused by any showing of care, however assiduous."

3. "A railroad employee is not excluded from the benefits of the Federal Safety Appliance Act by the fact that his work is that of inspection for the purpose of discovering defects of the sort which caused his injury."

In rendering the opinion, the Chief Justice used the following language:

> "The liability springs from its being made unlawful to use cars not equipped as required,—not from the position of the employee may be in or the work which he may be doing at the moment when he is injured, provided the defective equipment is the proximate cause of the injury,"

which language was used by the Court in L. & N. R. Co. v. Layton, supra.

In Louisville & Nashville Railroad v. Layton, supra, an action by Layton, an employee of the railroad, for damages due to defective brakes. In affirming the verdict, the Court dealt upon the purpose of such legislation, saying:

> "By this legislation the qualified duty of the common law is expanded into an absolute duty with respect to car couplers, and if the defendant railroad companies used cars which did not comply with the standard thus prescribed, they violated

the plain prohibition of the law, and there arose from that violation a liability to make compensation to any employee who was injured because of it. (citing cases).

"While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employees only when so engaged. The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in, or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of injury to them when engaged in the discharge of duty."

Fairport, Painesville & Eastern Railroad Company v. Meredith, supra, was an action for injuries resulting from a collision at a railway crossing between automobilist and a train of the railroad. Train had good brakes, but air was disconnected,—a violation of the Safety Appliance Act. Verdict for Meredith sustained. Court held that:

1. "The qualified duty imposed by common law on a railroad company to provide and keep in reasonably safe condition adequate brakes for the control of its trains is converted by the Federal Safety Appliance Act into an absolute duty, from the vio-

lation of which there arises a liability for an injury resulting therefrom to any person falling within the terms and intent of the act."

2. "The nature of the duty imposed by a statute and the benefits resulting from its performance usually determine what persons are entitled to invoke its protection."

3. "Failure to comply with the requirements of the Federal Safety Appliance Act that power brakes be used in operating trains in an actionable breach of duty towards travelers on highways as well as towards railroad employees and passengers."

In Michelson v. Erie Ry., (1929) 106 N. J. L. 147, 147 Atl. 535, 16 Neg. cases at p. 294, plaintiff was an employee of Fred Snare Corp., the consignee of logs hauled on Erie Railway flat cars delivered to consignee. Logs on the flat cars were supported by stakes and wires. Plaintiff chopped one stake, other gave way. Logs rolled off flat car onto plaintiff and killed him. Inspection disclosed stakes which broke were decayed which was not a latent defect.

HELD: It was the duty of the railway to inspect said stakes,—it owed the same duty to plaintiff, the employee of consignee, as to its own employees. Verdict for plaintiff affirmed. (This is the Court which 10 years earlier decided Drago v. Central Ry. of N. J., 93 N.J. 176, 103 Atl. 803 in 1918.)

## Employer-Employee Doctrine

The criterion of applicability of the Federal Employers' Liability Act is the employee's "occupation" at the time of his injury in interstate transportation or

work so closely related thereto as to be practically a part of it.

N. Y. N. H. & H. v. Bezue, 284 U.S. 415, 76 L. Ed. 370, 52 Sup. Ct. 24, 77 A.L.R. 1370;

Shanks v. D. L. & W., 239 U.S. 556, 60 L. Ed. 436;

C. & E. I. v. Indus. Com., 284 U.S. 296, 76 L. Ed. 304, 52 Sup. Ct. 151.

The mere fact of employment by an interstate railroad does not bring an employee within the Federal Employers' Liability Act.

N. Y. N. H. & H. v. Bezue, 284 U.S. 415, 76 L. Ed. 370;

D. L. & W. v. Yurkonis, 238 U.S. 439, 59 L. Ed. 1397, 35 Sup Ct. 902;

C. B. & Q. v. Harrington, 241 U.S. 177, 60 L. Ed. 941, 36 Sup. Ct. 517;

N. Y. C. v. White, 243 U.S. 188, 61 L. Ed. 667;

I. A. C. v. Davis, 259, U. S. 182, 66 L. Ed. 888, 42 Sup. Ct. 489.

Nor the mere fact of non-employment by a railroad engaged in interstate commerce does not preclude an employee from protection of the Federal Employers' Liability Act.

Cimorelli v. N. Y. C., 148 F. 2d 575;

Erie Ry. v. Margue, 23 F. 2d 664;

Penn. Ry. v. Roth, 163 F. 2d 161;

Penn. Ry. v. Barlion, 172 F. 2d 710;

Annotation: Who within and without F. E. L. A., 77 A.L.R. 1374-81;

Master & Servant, Secs. 91-97 A.L.R. Digest.

In truth a violation by the railroad of the Safety Appliance Act affords relief to a member of the public if injured by reason of the infraction of said Act.

> Fairport, P. & E. Railroad v. Meredith, 292 U.S. 589, 78 L. Ed. 1446.

We submit that the contention in behalf of appellant finds support in the trend and policy of decisions of the U. S. Supreme Court and certain circuit courts, as well as in the statutes of the Congress. The benefits of the Federal Employers' Liability Act have been extended to seamen by Sec. 33 of The Merchant Marine Act of June 5th, 1920, 46 U.S.C.A., Sec. 688, known as the Jones Act. And by construction of the courts the rights and benefits of the obligation of seaworthiness, traditionally owed by an owner of a ship to a seaman, have been extended to a stevedore injured while working aboard the ship, doing a seaman's work, though employed by an independent stevedore company, (Seas Shipping Co. v. Sieracki, supra).

Sieracki was employed by an independent stevedoring company which was under contract with Seas Shipping Co. to load its ship. Sieracki was on the vessel loading cargo. The shackle supporting the boom broke at its crown causing the boom and tackle to fall and injure Sieracki. He sued three concerns. District court held Bethlehem Steel Co. and Bethlehem Sparrow's Point liable due to defect in forging shackle, but held favorable to Seas Shipping Co. On appeal Circuit Court held that Sieracki was entitled to same rights as seamen and should recover against Seas Shipping Co. for the

ship's lack of seaworthiness. Aff. by U. S. Supreme Court.

In the Sieracki case, supra, in rendering its opinion the Court laid down principles and utterances applicable to case at bar:

> An employee of a stevedoring company engaged in loading a ship, injured while working aboard the ship by a defect in its equipment amounting to unseaworthiness, may recover damages from the shipowner.
>
> For injuries incurred while working aboard a ship in navigable waters a stevedore is entitled to the seaman's traditional and statutory protection regardless of the fact that he is employed immediately by another than the owner.
>
> The obligation of seaworthiness imposed upon the owner of a vessel in favor of those in the vessel's service is one which he cannot delegate; nor can he contract it away as to any workman within the scope of its policy.

This rule laid down in the Sieracki case, supra, was followed by this Court in United States v. Arrow Stevedoring Co., 175 F. 2d 329.

In Standard Oil Co. v. Anderson, supra, a leading case on the "loaned servant doctrine", but not involving the application thereof under the Federal Employers' Liability Act, applied the same reasoning and obtained the same result as in the Sieracki case and applied the test, whose work was it.

The plaintiff was a longshoreman employed by a master stevedore who under contract with defendant was engaged in loading ship Susquehanna with oil.

Plaintiff was working in hold where without his fault he was injured by load of oil unexpectedly lowered. All loading was done by employees of stevedore except operation of winch by winchman, an employee of defendant.

The question for determination was whether winchman was the servant of defendant or of stevedore at the time plaintiff was injured. If he was the servant of defendant then defendant was responsible; if not, that ends the case. The winchman was hired and paid by defendant who alone had the right to discharge him. The stevedore had no control over the movements and conduct of the winchman except that the hours of labor of winchman necessarily conformed to the hours of labor of plaintiff. The winchman had to rely upon employees of stevedore for signals for hoisting and lowering of loads of cases of oil. The negligence claimed was lowering a draft of cases before receiving signal. Verdict for plaintiff. Affirmed by Circuit and U. S. Supreme Courts.

The Court laid down the test by which it could be determined whether appellee was liable, namely: "Whose is the work being performed,—a question which is usually answered by ascertaining who has the *power of control* in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking."

It is respectfully asserted that a common carrier,

under a franchise from a commonwealth, can never lose the power to control, can never delegate that duty, nor escape the responsibility. The absurdity of a contrary contention is readily seen by pursuing the matter to its logical extremes, i.e.: Supposing the carrier sub-let to various and sundry contractors its various and sundry duties,—its repairs of bridges to A,—its trains to B, its signal system to C, its roadbed to D, et ad infinitum. To state the question is to give the answer.

The rule herein established was followed by Chief Justice Taft in Linstead v. C. & O. R. Co., supra.

## Appellee Authorities

Appellee will rely perhaps on C. R. I. & P. v. Bond, 240 U.S. 449, 60 L. Ed. 735. In that case the railway was in the position where it could in fact turn over the work in question to Turner, an independent contractor, and allow him to carry on the work as an independent contractor. In the work Turner could have carried on his job 24 hours of the day without any interference with the operation of the trains and the commerce of the Rock Island Railroad. That is to say, the freedom of action of the Rock Island was in no way curtailed and the statute as interpreted at that time in 1915 has no application to the situation as of the present time or at any time since the 1939 Amendment but eliminating the 1939 Amendment entirely, the Bond case as it is called, is no criterion for the case at bar. In case at bar, appellee could not grant to the Gilpin Construction Company the freedom of action that the Rock Island

granted to Turner. Appellee was, by franchise with the state in carrying on its interstate commerce, bound to keep itself in the position where it could control the bridge and could use it in its daily interstate commerce, which in fact it did use, and Gilpin Construction Company subordinated its work to the rights of appellee in that Gilpin Construction Company received and observed the train orders of appellee issued from day to day in the operation of its trains over the trestle in question. Appellee was also duty bound by its franchise to maintain and keep in repair its instrumentalities used by it in its interstate commerce. This was a duty which it could not abdicate. This was an essential function of appellee which it could not delegate to any body. Neither the appellee nor the Rock Island in 1915 could have delegated to an independent contractor the repair of the tracks and trestles used by them in interstate commerce. The power of control lodged in the common carrier is a power that it cannot delegate.

It is rather interesting to refer to Kamboris v. O. W. R. & N., 75 Ore. 358, decided in 1915 by the Supreme Court of Oregon, dealing with the same subject as by the Illinois Court in the Bond case. Be it said to the credit of the Oregon Court that it laid down the law in 1915 which has been the law everywhere since the 1939 Amendment to the Federal Employers' Liability Act.

The Bond case and the case of Casement v. Brown, and like authorities, are disposed of by A. C. L. v. Tredway, supra, in the following language:

> "They are inapplicable to the instant case, for the reason that the duties of the servant in question

were of such a character, as above noted, that they could not be assigned by the defendant to an independent contractor so as to release itself from the position of responsibility for their proper discharge. That is to say, the defendant could not abdicate its position of master with regard to the plaintiff's intestate in the instant case, by delegating or assigning its duty of control of such servant to any independent contractor. It is not a case in which the doctrine of independent contractor is applicable. See authorities collated in note to 66 L.R.A. pp. 119, 136, 137, 140, 142; Boucher v. New York, N. H. & H. R. Co., supra, 13 L.R.A. (N.S.) 1177, and authorities collated in note thereto."

Other authorities on C. R. I. & P. v. Bond and against the contention of appellee are:

Kamboris v. O. W. R. & N., 75 Ore. 358, 146 Pac. 1097;

Erie Railway Co. v. Margue, 23 Fed. 2d 664;

Cimorelli v. New York Central Railroad Co., 148 Fed. 2d 575;

Pennsylvania Railroad Co. v. Roth, 163 F. 2d 161.

Penn. Ry. Co. v. Barlion, supra, 172 F. 2d 710.

So in conclusion, let us close by observing that the relationship of master and servant existed between appellee and appellant, but did not exist between the independent contractor and appellant. Appellant rendered and discharged and appellee received and accepted a service of a character with respect to which the duty of the railroad under its franchise was non-assignable. The State of Washington granted an exclusive prerogative to appellee, and, only of appellee could the state exact

performance. The duty was the exclusive obligation of appellee and that duty could not be evaded, assigned or delegated, nor could it be contracted away. All who rendered services for appellee pursuant to that duty, or in its discharge were servants of appellee, and the independent contractor was its agent or vice-principal.

And the responsibility to provide appellant and his fellow servants a safe place in which to repair the bridges was the responsibility of appellee and it alone must bear the blame for the injuries sustained by appellant.

These principles of law form the crux of this case. The parties admit and the court has found that, "It was the duty of defendant to maintain its railway lines and its roadbed, tracks and bridges in a reasonably safe condition for its use in interstate commerce." We contend that this is a positive duty, that it is absolute, that it is non-delegable, that it is non-assignable, that it is a personal duty, that the railroad cannot in law abdicate its power of *control* of the instrumentalities that are indispensable in its performance of the duties imposed upon it by its franchise. The responsibility is constant, it never shifts. True, railroads do permit other railroads to use their roads, their right of ways, their bridges, sometimes a railroad assigns to another road the cost and obligation of maintaining signal system along its tracks, sometimes a railroad agrees with contractors to repair its bridges, etc., but in all of these instances the railroad which obtained the franchise is responsible to those sustaining injury because of negligence on the part of that one selected by the carrier to perform its

work and because the "power of control" rested and remained in the railroad,—grantee of the franchise,—who could not bargain it away or abdicate it even if it so desired. And if, by exigencies of whatever nature, it did contract, assign or lease such personal, positive, unalienable, non-delegable duty and negligence occurred in the execution or performance thereof and damages to anyone occurred, the franchise holder must answer.

## CONCLUSION

Therefore, it is respectfully contended that the District Court made error prejudicial to the rights of the appellant; and that the judgment of the District Court should be reversed and the action remanded to the Trial Court for trial upon the merits.

Respectfully submitted,

ELTON WATKINS,
Attorney for Plaintiff-Appellant.